



# *COMMONWEALTH of VIRGINIA*

## DEPARTMENT OF ENVIRONMENTAL QUALITY

### Blue Ridge Regional Office

[www.deq.virginia.gov](http://www.deq.virginia.gov)

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## STATE WATER CONTROL BOARD ENFORCEMENT ACTION - ORDER BY CONSENT ISSUED TO NEW RIVER RESOURCE AUTHORITY FOR UNPERMITTED ACTIVITY AT THE REGIONAL SOLID WASTE MANAGEMENT FACILITY

### **SECTION A: Purpose**

This is a Consent Order issued under the authority of Va. Code § 62.1-44.15, between the State Water Control Board and New River Resource Authority, regarding its Regional Solid Waste Management Facility, for the purpose of resolving certain violations of State Water Control Law and the applicable permit and regulations.

### **SECTION B: Definitions**

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
2. "BRRO-R" means the Blue Ridge Regional Office of DEQ, located in Roanoke, Virginia.
3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.
4. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.

5. "Discharge" means, when used without qualification, a discharge of a pollutant, or any addition of a pollutant or combination of pollutants, to state waters or waters of the contiguous zone or ocean other than a discharge from a vessel or other floating craft when being used as a means of transportation.
6. "Dredging" means a form of excavation in which material is removed or relocated from beneath surface waters.
7. "Facility" means the Regional Solid Waste Management Facility, located at 7100 Cloyds Mountain Road in Pulaski County, Virginia. The Facility is owned and operated by NRRA.
8. "Fill" means replacing portions of surface water with upland, or changing the bottom elevation of surface water for any purpose, by placement of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris. 9 VAC 25-210-10.
9. "Fill Material" means any pollutant which replaces portions of surface water with dry land or which changes the bottom elevation of a surface water for any purpose. 9 VAC 25-210-10.
10. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
11. "NRRA" means the New River Resource Authority, a corporation authorized to do business in Virginia and its affiliates, partners, and subsidiaries. The New River Resource Authority is a "person" within the meaning of Va. Code § 62.1-44.3.
12. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.
13. "Pollutant" means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution. 9 VAC 25-210-10.
14. "Pollution" means such alteration of the physical, chemical or biological properties of any state waters as will or is likely to create a nuisance or render such waters: (i) harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish or aquatic life; (ii) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (iii) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses; provided that (a) an alteration of the physical, chemical, or biological property of state waters, or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution, but which, in combination with such alteration of or discharge or deposit to state waters by other owners is sufficient to cause pollution; (b) the discharge of untreated sewage by any owner into state waters; and (c)

contributing to the contravention of standards of water quality duly established by the board, are "pollution." Va. Code § 62.1-44.3; 9 VAC 25-210-10.

15. "Regulations" means the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210 *et seq.*
16. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code. Article 2.2 (Va. Code §§ 62.1-44.15:20 through 62.1-44.15:23) of the State Water Control Law addresses the Virginia Water Resources and Wetlands Protection Program.
17. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3 and 9 VAC 25-210-10.
18. "Stream Restoration" means the process of converting an unstable, altered or degraded stream corridor, including adjacent areas and floodplains, to its natural conditions.
19. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.
20. "USACE" means the United States Army Corps of Engineers.
21. "Virginia Water Protection Permit" means an individual or general permit issued under Va. Code § 62.1-44.15:20 that authorizes activities otherwise unlawful under Va. Code § 62.1-44.5 or otherwise serves as the Commonwealth's certification under § 401 of the federal Clean Water Act (33 United States Code ("USC") § 1344).
22. "Va. Code" means the Code of Virginia (1950), as amended.
23. "VAC" means the Virginia Administrative Code.
24. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 9 VAC 25-210-10.
25. "Warning Letter" or "WL" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.

### **SECTION C: Findings of Fact and Conclusions of Law**

1. NRRA owns and operates the Facility in Pulaski County, Virginia. The Facility operates under Solid Waste Management Permit No. 548, issued on January 15, 1993 and VPDES Industrial Stormwater General Permit No. VAR051283.

2. On July 5, 2011, the NRRA supplied DEQ with photos of grading operations involved with landfill activities as part of their Stormwater Erosion and Sediment Control compliance in order to allow DEQ to monitor.
3. On July 14, 2011 and July 26, 2011, DEQ staff inspected the Facility for compliance with the requirements of the State Water Control Law and Regulations. The DEQ inspector observed that grading activity associated with Facility expansion resulted in discharges of fill material into surface waters.
4. On July 28, 2011, USACE issued a memorandum confirming impacts to waters. Va. Code § 62.1-44.15:20 and the Regulations at 9 VAC 25-210-50 prohibit dredging or filling of surface waters without a Virginia Water Protection (VWP) Permit issued by the Director.
5. On August 2, 2011, representatives of NRRA, USACE, and DEQ met to discuss the Facility expansion project.
6. On August 8, 2011, USACE issued a letter to NRRA advising that grading activity in "Waters of the U.S." cease and desist until federal authorization under Section 404 of the Clean Water Act (33 U.S.C. 1344) was obtained.
7. On September 7, 2011, NRRA submitted a delineation report to USACE mapping the location and extent of Waters of the U.S. at the Facility within active expansion areas.
8. On October 6, 2011, the Department issued NOV No. W2011-08-W-001 to NRRA for the violation of Va. Code § 62.1-44.15:20 and the Regulation, 9 VAC 25-210-50.
9. On November 2, 2011, and March 29, 2012, USACE staff conducted field reviews of the Facility in support of its review of the NRRA delineation report.
10. On February 15, 2012, NRRA and DEQ met to discuss the Facility expansion project.
11. On April 25, 2012, USACE issued an Approved Jurisdictional Determination for active Facility expansion areas, see map prepared for NRRA dated "April 12, 2012."
12. NRRA along with Federal governmental agencies began development of a comprehensive compensatory mitigation plan.
13. On August 13, 2014, USACE issued a Preliminary Jurisdictional Determination to NRRA for a potential compensation site, denoted the "West Fork Mitigation Site," located on 108 acres in Floyd County, Virginia.
14. On September 10, 2014, USACE issued a Preliminary Jurisdictional Determination to NRRA for the remainder of the Facility property, accepted by NRRA on September 15, 2014.

15. On October 1, 2014, USACE advised DEQ that NRRA requested authorization to address unpermitted impacts to surface waters at the Facility using USACE's "Nationwide Permit 32, Completed Enforcement Actions (NWP 32)." On October 6, 2014, USACE advised NRRA that in addition to the USACE permit, a Clean Water Act, Section 401 Water Quality Certification, would need to be obtained from DEQ.
16. On October 22, 2014, NRRA, USACE, and DEQ met to discuss the process for obtaining USACE and DEQ authorizations to address unpermitted impacts to surface waters at the Facility.
17. On November 13, 2014, DEQ staff visited the potential compensation site, West Fork Mitigation Site. On November 24, 2014, DEQ issued a memorandum summarizing inspection observations.
18. On November 26, 2014, DEQ received NRRA's compensation plan entitled "Draft Wetland & Stream Compensation Plan, West Fork Mitigation Site, Floyd County, Virginia" (Compensation Plan).
19. On December 16, 2014, NRRA and DEQ meet to discuss the Compensation Plan, and DEQ provided comments pertaining to the Compensation Plan at the meeting.
20. On February 9, 2015, DEQ received NRRA's revised Compensation Plan. In support of Compensation Plan review, DEQ requested an opportunity to evaluate locations of surface water impacts at the Facility.
21. On April 29, 2015, NRRA and DEQ met to evaluate locations of surface water impacts at the Facility.
22. On May 15, 2015, DEQ issued a letter to NRRA summarizing its observations from the on-site evaluation. DEQ understands from the Compensation Plan that NRRA will create a minimum of 0.52 acres of palustrine forested wetland, 0.19 acres of palustrine scrub-shrub wetland, and 0.36 acres of emergent wetland. NRRA will restore, enhance and preserve a minimum of 8,004 stream credits as required to mitigate impacts to streams at NRRA's Cloyds Mountain Landfill.
23. On June 2, 2015, USACE verified NRRA's coverage under Nationwide Permit number 32 (NWP 32). The NWP 32 verification included a "Resolution Agreement" between the USACE and NRRA dated May 15, 2015, which approved the Compensation Plan by the USACE. It appears there will be an excess of stream and wetland mitigation which meets the requirements of the NWP 32 and the resolution agreement to provide for environmental benefit.
24. Based on DEQ inspections, USACE correspondence, and DEQ's review of the Compensation Plan, the Board concludes NRRA has violated Va. Code § 62.1-44.15:20 and the Regulation, 9 VAC 25-210-50.

25. In order for NRRA to return to compliance, DEQ staff and representatives of NRRA have agreed to the Schedule of Compliance incorporated as Appendix A and B of this Order.
26. This Order shall constitute DEQ's certification under § 401 of the federal Clean Water Act (33 United States Code ("USC") § 1344).

#### **SECTION D: Agreement and Order**

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders NRRA, and NRRA agrees to:

1. Perform the actions described in Appendix A and B of this Order; and
2. Pay a civil charge of **\$39,670.<sup>00</sup>** within 30 days of the effective date of the Order in settlement of the violations cited in this Order.

Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control  
Department of Environmental Quality  
Post Office Box 1104  
Richmond, Virginia 23218

NRRA shall include its Federal Employer Identification Number (FEIN) (**54-1406379**) with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF). If the Department has to refer collection of moneys due under this Order to the Department of Law, the NRRA shall be liable for attorneys' fees of 30% of the amount outstanding.

#### **SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend this Order with the consent of NRRA for good cause shown by NRRA, or on its own motion pursuant to the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, after notice and opportunity to be heard.
2. This Order addresses and resolves only those violations specifically identified in Section C of this Order. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility; or (3) taking subsequent action to enforce the Order.

3. For purposes of this Order and subsequent actions with respect to this Order only, NRRA admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.
4. NRRA consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. NRRA declares it has received fair and due process under the Administrative Process Act and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.
6. Failure by NRRA to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. NRRA shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part. NRRA shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. NRRA shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
  - a. the reasons for the delay or noncompliance;
  - b. the projected duration of any such delay or noncompliance;
  - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance;  
and
  - d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which the parties intend to assert will

result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto and any successors in interest, designees and assigns, jointly and severally.
  10. This Order shall become effective upon execution by both the Director or his designee and NRRRA. Nevertheless, NRRRA agrees to be bound by any compliance date which precedes the effective date of this Order.
  11. This Order shall continue in effect until:
    - a. The Director or his designee terminates the Order after NRRRA has completed all of the requirements of the Order;
    - b. NRRRA petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or
    - c. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to NRRRA.
- Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve NRRRA from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.
12. Any plans, reports, schedules or specifications attached hereto or submitted by NRRRA and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.
  13. The undersigned representative of NRRRA certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind NRRRA to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of NRRRA.
  14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.
  15. By its signature below, NRRRA voluntarily agrees to the issuance of this Order.

Consent Order  
New River Resource Authority  
IR2012-W-0204; BR11-1101  
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And it is so ORDERED this \_\_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_  
Robert J. Weld, Regional Director  
Department of Environmental Quality

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New River Resource Authority voluntarily agrees to the issuance of this Order.

Date: 6/2/16 By: Joseph R. Levine EXECUTIVE DIRECTOR  
(Person) (Title)  
New River Resource Authority

Commonwealth of Virginia  
City/County of Pulaski

The foregoing document was signed and acknowledged before me this 8<sup>th</sup> day of  
June, 2016, by Joseph R. Levine who is  
Executive Director of New River Resource Authority, on behalf of the  
company.

Marjorie Whitaker Atkins  
Notary Public

218522  
Registration No.

My commission expires: 10/31/2017

Notary seal:

MARJORIE WHITAKER ATKINS  
Notary Public  
Commonwealth of Virginia  
218522  
My Commission Expires Oct 31, 2017



## APPENDIX A SCHEDULE OF COMPLIANCE

1. Not later than **July 01, 2016**, NRRA shall submit a Final Compensation Plan (“Compensation Plan”) that shows NRRA will create a minimum of 0.52 acres of palustrine forested wetland, 0.19 acres of palustrine scrub-shrub wetland, and 0.36 acres emergent wetland as required to mitigate wetland impacts. The Compensation Plan shall show that NRRA will restore, enhance and preserve a minimum of 8,004 stream credits, as required to mitigate impacts to streams at NRRA’s Cloyds Mountain Landfill. The Compensation Plan shall include a mechanism for protecting in perpetuity the compensation site(s) to include all state waters within the compensation site boundary. Such protections shall be in place within 30 days of Plan approval. The restrictions, protections, or preservations, or similar instrument, shall state that no activity will be performed on the property in any area designated as a compensation area with the exception of maintenance or corrective action measures authorized by the Board. Unless specifically authorized by the Board through the issuance of a VWP individual or general permit, or waiver thereof, these restrictions apply to ditching, land clearing or the discharge of dredge or fill material. Such instrument shall contain the specific phrase "ditching, land clearing or discharge of dredge or fill material" in the limitations placed on the use of these areas. The protective instrument shall be recorded in the chain of title to the property.
2. NRRA shall respond to any DEQ Notice of Deficiency regarding the Compensation Plan within fourteen (14) calendar days. NRRA shall comply with the Compensation Plan as an enforceable part of this Order, after it is approved by DEQ as well as financial assurance requirements in Appendix B.
3. Not later than 30 days after Compensation Plan approval, NRRA shall submit Proof of recordation of the protective instrument utilized pursuant to the requirements of Paragraph 1 above for all compensation sites.
4. Unless otherwise specified in this Order, NRRA shall submit information required by this Order, including Appendix A and B:

Jeffrey Hurst  
Deputy Regional Director  
DEQ – Blue Ridge Regional Office  
3019 Peters Creek Road  
Roanoke, VA 24019  
(540) 562-6766  
Fax (540) 562-6725  
[Jeffrey.Hurst@deq.virginia.gov](mailto:Jeffrey.Hurst@deq.virginia.gov)

## **APPENDIX B**

### **Financial Assurance Requirements**

1. No later than **July 31, 2016**, based on the cost estimates approved by DEQ, NRRRA shall demonstrate financial responsibility for taking any proposed corrective action in Appendix A by obtaining a letter of credit or demonstrating NRRRA or any mitigation services provider it has engaged to perform the corrective action has secured a performance bond with terms acceptable to DEQ. If a letter of credit is obtained, the following conditions shall apply:
  - a) The issuing institution shall be a bank or other financial institution that has the authority to issue letters of credit and whose letter of credit operations are regulated and examined by the Commonwealth of Virginia, by a federal agency, or by an agency of another state. The letter of credit shall be irrevocable and issued for a period of at least one year. The letter of credit shall provide that the expiration date will be automatically extended for a period of at least one year. If the issuing institution decides not to extend the letter of credit beyond the current expiration date it shall, at least 120 days before the date, notify both NRRRA and the Director by certified mail of that decision. The 120 day period will begin on the date of receipt by the Director as shown on the signed return receipt. Expiration cannot occur, while an enforcement action is pending. Within 60 days of receipt of notice from the issuing institution that it does not intend to extend the letter of credit, NRRRA shall obtain alternate financial assurance and submit it to the Director.
  - b) Every year, beginning **September 1, 2017**, until DEQ determines financial assurance is no longer necessary, NRRRA shall submit an updated cost estimate for all remaining actions required by Appendix A. Whenever the cost estimate increases such that the letter of credit covers less than 75% of the cost estimate, NRRRA shall, no later than December 31 of that year, cause the amount of credit to be increased to an amount at least equal to 75% of the new estimate or obtain other financial assurance approval by DEQ to cover the increase. Whenever the cost estimate decreases, the letter of credit may be reduced to the amount of 75% of the new estimate following written approval by the Director. The issuing institution shall send the notice of an increase or decrease in the amount of the credit to the Director by certified mail no later than December 31 of that year.
  - c) If the DEQ determines that NRRRA has not met its obligations under this Order, the Director of DEQ or his designee, shall give written notice to NRRRA, specifying the deficiency. Any notice required hereunder shall be deemed effective given by registered mail, return receipt requested.
  - d) In the event of unsatisfactory completion of the activities required by Appendix A of this Order (as determined by DEQ), or NRRRA's failure to meet the deadline set by this Order for completing the stream restoration, the Director may cash the letter of credit.

- e) NRRA may cancel the letter of credit only if alternate financial assurance acceptable to the Director is substituted as specified in this section or if NRRA is released by the Director from the requirement of this Order.
  
- f) The Director shall return the original letter of credit to the issuing institution for termination when:
  - i. NRRA substitutes acceptable alternate financial assurance for the restoration work; or
  - ii. Restoration work is completed in accordance with this Order and the Director notifies NRRA that it is no longer required to maintain financial assurance.

